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In the Supreme Court
of the United States

OCTOBER TERM, 1966

No. 1335

EZRA PARKS,

Petitioner,

v.

SIMPSON TIMBER COMPANY, a corporation, and GRACE LINE, INC., a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT SIMPSON TIMBER COMPANY IN OPPOSITION

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Respondent SIMPSON TIMBER COMPANY, opposing the issuance of a Writ of Certiorari, prays for denial of the petition. Petitioner's Citations to Opinions Below, statement of Jurisdiction, and statement of Constitutional Provisions Involved are accurate and adequate.

QUESTIONS PRESENTED

1. Whether the manufacturer-packager of an article, not inherently dangerous, may be justly held liable to a longshoreman who sustains injury while loading the package on board a vessel, as the result of using the package for a peculiar purpose unintended, unanticipated and unknown to the manufacturer.

2. Whether a manufacturer of a product which is not inherently dangerous is required to anticipate misuse of the product at his peril.

3. Whether a federal appellate court has inherent power to correct error and alleviate injustice where the issue is not precisely and articulately raised by the parties.

4. Whether the fundamental error discerned by the Ninth Circuit was properly preserved for review.

STATEMENT

The record and the several opinions below (set forth as Petitioner's Appendices A, B, and C) contain a plethora of factual matter. Petitioner's statement is generally adequate. However, it might be expanded since the issues are primarily factual.

Petitioner brought an action to recover damages for personal injury sustained while working as a longshoreman in and about the No. 5 hatch of the

SS SANTA FLAVIA. The incident occured on September 8, 1962, at Portland, Oregon.

Petitioner was loading cargo aboard the vessel owned and operated by respondent Grace Line, Inc. The cargo included bundles of doors packaged and delivered to the dock by respondent Simpson Timber Company. The bundles were approximately 42 inches in height and the window openings were aligned. The packages were marked "Fine Doors." The packaging was of corrugated cardboard on all sides except the end; it was intended to protect the doors from damage during transit (R. IV, 200, 208-209).

Simpson had sold the doors to Oregon Lumber Export Co., f.o.b. dock (R. IV, 195-196, Ex. 31, 32). Oregon Lumber Export Co. (the shipper) made the arrangement to transport the doors upon Grace Line vessels (R. IV, 200). No complaint had ever been made regarding the packaging (R. IV, 197, 209, 210, 214) and Simpson did not anticipate that longshoremen would walk on the doors (R. IV, 198, 210, 214).

The doors were loaded onto the vessel and placed in the square of the hatch (R. IV, 43); the longshoremen walked upon the packages of doors while loading sacks of flour. Petitioner fell into a package of doors while carrying such a sack (R. IV, 50).

Respondent Simpson did not know it was the custom of longshoremen to walk upon the cargo during the loading process (R. IV, 210-216). Respondent's Portland plant manager had presumed that the cargo was maneuvered by forklifts and the packages

were designed to be so handled (R. IV, 212-213). Other manufacturers in the area packaged their doors in the same fashion and did not expect longshoremen to walk on them (R. IV, 231), and apparently petitioner's unfortunate accident was the first such mishap (R. IV, 214-216).

Despite the trial court's belief that he gave most of Simpson's requested instructions "verbatim" (R. IV, 259), it is undisputed that several were requested and refused, e.g., Simpson's Requested Instructions XII, XXIII (R. IV, 259-260). The District Court did extensively instruct the jury upon Simpson's negligence (e.g., R. IV, 271-275), and these instructions were not in conformity with Simpson's motions for a directed verdict, or its requested instructions. Simpson's counsel took exception as follows:

> "MR. ROBERTS: Your Honor, the defendant Simpson objects to the Court's definition and instruction as to the liability of the manufacturer of a packaged article in that the instruction did not indicate that the liability only arises from the use of an article as intended by the manufacturer, and on the further ground, Your Honor, that the evidence in this case indicated that the manufacturer, even under the Court's theory, would have an obligation perhaps to have a proper floor under the package for the workmen, but not for the workmen carrying other cargo. Now, the manufacturer has no obligation to anticipate that the workman is going to carry other cargo onto the package, and therefore, I think the instruction is an incorrect instruction as to the law in this case, Your Honor. (R. IV, 298-299.)
>
> . . . . .

"THE COURT: You may have your exceptions." (R. IV, 300.)

Respondent Simpson's appeal was taken from each and every portion of the record and judgment (R. II, 146, Notice of Appeal), and the Statement of Points on Appeal and other post-trial documents encompassed error in the instructions in conformity with Simpson's theories of the case. See, e.g., Points 1-4, 7, 9, on Motion for Judgment Notwithstanding the Verdict, R. II, 130-131; Points 4-7, 12 on Motion in the Alternative for a New Trial, R. II 131-133; Point 6, Statement of Points on Appeal, R. II, 186; Brief for Appellant Simpson Timber Company, pp. 14, 16.

Simpson is entitled to a new trial *vis-a-vis* the petitioner. There was certainly substantial error committed as to Simpson which can be corrected by the district court. The Ninth Circuit also held that the error permeated the instructions as to Grace Line, Inc.; this point is beyond the scope of respondent Simpson's brief.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to grant petitioner's requested Writ of Certiorari. The Ninth Circuit decision was proper, and was achieved after careful consideration and purposive reasoning by a respected circuit bench *en banc*. The decision resolved a complex factual dispute; the cause has been remanded for a new trial by jury, pursuant to proper

instructions on the law. None of the reasons set forth in Rule 19 of the Rules of this Court exist here.

I

PETITIONER'S DECISIONAL CONFLICTS ARE IMAGINED, NOT REAL

Petitioner's vigorous protests that the Ninth Circuit decision conflicts with decisions of this Court, and appellate courts generally, is unrealistic. The instant case is one of complex facts; the District Court, a panel of the Ninth Circuit, and the Ninth Circuit *en banc* on rehearing, carefully considered the issues and reached a reasoned result. The Ninth Circuit committed no error. The case was remanded for a new trial and plaintiff will have his day in court, attended by proper jury instructions.

Petitioner's parade of horribles would ring true if the Ninth Circuit decision deviated from the wisdom of other courts. The earlier decision by the three-man panel (Petitioner's App. B) *did conflict* with the two most nearly factually apposite decisions discovered: *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959), and *Cohagen* v. *Laclade Steel Co.*, 317 S.W.2d 452 (Mo. 1958). The decision on rehearing (from which this petition is sought) adjusted the conflict. If anyone should complain, it is *Simpson*, not petitioner, since *McCready* and *Cohagen* require a verdict for Simpson. Nevertheless, Simpson is willing to submit the case again on retrial as to all parties, and petitioner has no cause for grief.

Petitioner suggests a number of decisions which "conflict" with the Ninth Circuit ruling, but makes no attempt to show that these cases were factually apposite or analogous. It is generally settled that a conflict sufficient to warrant this Court to grant certiorari must be based upon law as applied to particular facts, and not upon dicta or general statements. See Stern and Gressman, *Supreme Court Practice* (3rd ed., B.N.A. 1962) § 4-3, p. 124.

The petition would be weightier and more convincing if the particular instruction found faulty was not abstracted out of context but was read in tone with the whole decision. The majority decision is proper and gives birth to no new and novel principle of law. It is the Petitioner who wishes to preserve a substantial verdict and judgment even if to do so would thrust an unnecesary burden upon the manufacturer.

At all appropriate times in the proceedings, Simpson asserted its basic proposition: A manufacturer-packager of an article which is not inherently dangerous is not responsible for injuries sustained by a longshoreman while loading the package aboard a vessel, when the injury occurred because of an unintended, unanticipated and unknown use of the package by the longshoreman. This same refrain, in different form, was reiterated in Simpson's motion for directed verdict, Simpson's objections and exceptions to instructions, Simpson's tender of requested instructions, Simpson's motions for judgment notwithstanding the

verdict, or, in the alternative for a new trial, and by Simpson's appeal.

The Ninth Circuit, on rehearing *en banc*, recognized Simpson's assertion, analyzed the evidence adduced in the curious factual situation, considered the instructions given, and concluded that the instructions given could have placed an untoward burden upon the manufacturer. The Court said:

> ". . . Put another way, to affirm the judgment as against Simpson would require affirmative answer to the question, may the manufacturer and packager of an article which is not inherently dangerous be justly held liable to a longshoreman who sustained injury, while loading the package aboard a vessel, as a result of using the package for a peculiar purpose not intended, anticipated, or known to the manufacturer?
>
> "An affirmative answer would, in turn, establish a principle, too far-reaching and onerous in application, that one who packs an item for shipment is burdened with a legal duty to ascertain the customary working practices of stevedores in any port which the purchaser, a shipper, or transporter might select for loading and embarkation. Acceptance of this proposition would require unprecedented extension of doctrines which impose liability upon manufacturers and a departure from those recognized tort rules which require no more than that a manufacturer packing his goods for shipment shall exercise ordinary care to eliminate hazards which are known to him." (Pet.'s App. A, 7-8)

Of course, a manufacturer is not permitted to

close his eyes in deliberate ignorance (which seems to be petitioner's interpretation of the opinion), but neither is he required to seek out the unnatural and unusual misuse of his product. It is this salient fact which must be brought to the attention of the jury; the instructions did not do so and the Ninth Circuit decision cures the defect by requiring a new trial. When the District Court forcefully brings the distinction to the jury's attention, Simpson will be assured of its right to a fair trial. The Ninth Circuit held that *McCready*, supra, and *Cohagen*, supra, were correctly decided, and should be followed. The Court stated:

> "When a duty rests upon a manufacturer because of his knowledge of a working practice like that which was followed here, he might quite easily fulfill it. A simple warning would ordinarily suffice. When, however, his shipment is to be entrusted to expert loaders and expert carriers, it hardly fits fair standards to say that there should rest upon him the burden to anticipate every course which the product is to follow and to acquire knowledge, in advance, as to the uses to which his product will be subjected by reason of working processes, perhaps unique, or even strange, of those who are to handle it.
>
> "Since it is not possible to determine which of the two principles contained within the questioned instruction was applied by the jury, and since one of the included principles was erroneous, the judgment against Simpson cannot stand. . . ." (Pet.'s App. A, 12-13).

Mere correction of an error occurring between litigants is not the normal function of this court and the proper remedy is the new trial granted by the Ninth Circuit. Normally, certiorari will not be granted upon a non-final decree, or to review the award of a new trial. See Stern and Gressman, *Supreme Court Practice*, supra, § 4-19, p. 148.

The District Court, *inter alia*, failed to bring home to the jury that Simpson was not required to anticipate the unusual misuse of its product. There is no variance with apposite cases of manufacturer's liability. At best, the "conflict" alluded to by Petitioner is technical; a matter of semantics, not of supervening importance. This Court ought *not* exercise its discretionary jurisdiction and grant Petitioner's writ.

II

NO RIGHTS OF PETITIONER WERE DENIED BY THE NINTH CIRCUIT

Petitioner was deprived of no rights and the "fair administration of federal appellate system" requires no supervisory intervention by this court.

After prolonged and careful deliberation, the Ninth Circuit determined that Simpson had been denied a fair trial by reason of trial court error, and remanded the case to cure the defect. All parties will have their day in court on the new trial. There is no fundamental unfairness in such a procedure. Petitioner's assertion that he is denied his right to a jury trial cannot be taken seriously. As Mr. Justice Frank-

furter said in dissent in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 455-456 (1959):

> ". . . If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence."

Petitioner asserts that the conduct of the Ninth Circuit contravened the principles of *Hormel* v. *Helvering*, 312 U.S. 552 (1941). The decision is inapposite. *Hormel* v. *Helvering* considered an appeal by the Commissioner of Internal Revenue from the Board of Tax Appeals to the Circuit Court of Appeals. In the Circuit Court of Appeals the Commissioner relied upon a provision of the code different from that raised before the B.T.A. and upon which no evidence had been introduced. The Circuit Court reversed the B.T.A. upon the "new" ground. This Court reversed the Circuit Court and remanded the matter to the B.T.A., permitting the taxpayer an opportunity to offer evidence pursuant to the recently relied-upon code section and in light of an intervening opinion.

This Court recognized that there existed cases wherein review would be permitted upon matters not specifically raised below and that procedural rules were not inflexible, 312 U.S. at 557. Mr. Justice Black stated, *ibid.*:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. . . "

This Court held, 312 U.S. at 559:

> "In accordance with this principle, we are of the opinion that the court below should have given and properly did give consideration to Section 22(a) [the newly relied-upon section] in determining petitioner's tax liability. . . ."

Assuming, *arguendo*, that petitioner's contentions are accurate, *Hormel* v. *Helvering* aids him not. There is a distinction between cases decided upon a legal theory which has theretofore been inarticulate (petitioner's apparent point) and decisions (like *Hormel* v. *Helvering*) decided on evidentiary grounds upon which a party has been denied an opportunity to introduce evidence.

Again assuming the validity of petitioner's position, petitioner would deny the inherent power of fed-

eral courts to correct error of law *sua sponte*. Anglo-American jurisprudence is premised upon a theory of residual power in the courts, jurisdiction once obtaining, to correct errors and to do justice. Even a party can request an appellate court to notice error in the first instance on appeal. See, e.g., *Andrews* v. *Olin Mathieson Chemical Corporation*, 332 F.2d 422, 428 (8th Cir. 1964); *Petty* v. *Porter*, 322 F.2d 308, 311 (6th Cir. 1963) cert. den. 377 U.S. 948; *Ramsey* v. *Travelers Insurance Company*, 317 F.2d 300, 302 (4th Cir. 1963).

Thus far, Simpson has indulged petitioner by assuming the validity of his assertions. Yet this premise, too, is open to question. Petitioner would have this Court believe that the Ninth Circuit, on rehearing *en banc*, reversed and remanded upon a ground which was wholly foreign to the prior proceedings and which had not been raised or considered, thus unjustly surprising petitioner and calling for some sanction by this Court. Such a position is inaccurate and unfair.

Respondent excepted to the general instructions of the Court dealing with the definition and liability of the manufacturer and packager of the article (R. IV, 298-300, supra). This position, wholly consistent with respondents' position throughout the trial and appeal, was reiterated in general terms on motions for judgment notwithstanding the verdict (R. II, 130-131), motions for new trial (R. II, 131-133), Statement of Points on Appeal (R. II, 186), and Brief of Simpson Timber Company on Appeal (see pp. 14, 16).

It is true that Simpson did not articulate its claim in the precise language utilized by Judge Ely in the Ninth Circuit. It is likewise true that the *fundamental* error complained of by Simpson and discerned by the Ninth Circuit to be embodied in the instruction, was fairly and fully stated throughout the proceedings and there is no need for this Court to sanction the Ninth Circuit via this Court's discretionary supervisory power.

CONCLUSION

There is no reason for a writ of certiorari to issue.

Respectfully submitted,

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